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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 CLEAN CRAWL, INC.,

9 Plaintiff,

v.

10 CRAWL SPACE CLEANING PROS,  
11 INC.,

12 Defendant.

CASE NO. C17-1340 BHS

ORDER DENYING  
DEFENDANT'S SECOND  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND  
GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO FILE  
DECLARATION

13 This matter comes before the Court on Defendant Crawl Space Cleaning Pros'  
14 (CSCP) second motion for partial summary judgment, Dkt. 120, and Plaintiff Clean  
15 Crawl, Inc.'s ("CCI") motion for leave to file declaration of Charles E. Henrichsen  
16 ("Second Henrichsen Decl."), Dkt. 129. The Court has considered the pleadings filed in  
17 support of and in opposition to the motions and the remainder of the file and hereby  
18 denies the motion for summary judgment and grants the motion for leave to file  
19 declaration for the reasons stated herein.  
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1                   **I.   PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

2                   This suit arises from copyright and trademark disputes between CCI and CSCP,  
3 two businesses which clean attic and crawl spaces and provide pest exclusion services for  
4 homes in the Western Washington area.

5                   CCI began doing business in its current iteration in 2001 when its president,  
6 Charles Henrichsen (“Henrichsen”), transferred his Bio Bug Pest Management, Inc.  
7 business to CCI, Dkt. 48 at 6, and began using the trade name Clean Crawls, Dkt. 49,  
8 Declaration of Charles Henrichsen (“Henrichsen Decl.”) at 3. CCI is headquartered in  
9 Marysville, Washington. Dkt. 1, ¶ 2. CSCP began operations on January 9, 2013, under  
10 founder and owner Richard Herron (“Herron”). Dkt. 39 (citing Dkt. 40, Declaration of  
11 Richard Herron (“Herron Decl.”), at 1). Henrichsen and Herron had met each other in  
12 2008, and Henrichsen declares that he mentored Herron in starting a business,  
13 Sustainable Building and Insulation (“SBI”). Henrichsen Decl. at 3–4. Henrichsen  
14 declares that he made SBI a CCI subcontractor, and one of his employees, CCI sales  
15 representative Jared Pullen (“Pullen”), referred “many jobs” to SBI. *Id.* at 4. Henrichsen  
16 declares that these referrals allowed Pullen and Herron to be “heavily exposed” to CCI’s  
17 “family of trademarks and copyrights” between 2010 and 2013. *Id.* Henrichsen also  
18 declares that all of CCI’s copyrighted materials at issue “were substantially completed in  
19 the form registered in the 2008-2009 time frame.” *Id.* at 5.

20                   Henrichsen specifically declares that by 2012, Herron and Pullen “knew and had  
21 used repeatedly in association with [CCI] its family of trademarks,” including the  
22 CLEAN CRAWLS trade name, WE GO WHERE YOU DON’T WANT TO (“Slogan

One”), and WE DO THE WORK YOU DON’T WANT TO (“Slogan Two”) (collectively “the family of marks”). Henrichsen Decl. at 4. Henrichsen declares that CCI has used the Clean Crawls trade name, Slogan One, and Slogan Two “and similar slogan variations with customers on a daily basis, and have for more than 15 years throughout the Pacific Northwest,” but typically has not used its slogans in printed advertising or on company vehicles or other items, “instead using them primarily on the Internet and verbally with customers, associates, and the public.” *Id.* 2–3, 6, 7. Henrichsen and others at CCI declare that CCI has used the Slogans extensively dating back to at least 2010. *See, e.g.* Henrichsen Decl. at 4; Dkt. 50 Declaration of Vice President of CCI Dale Gjerness (“Gjerness Decl.”) at 4–5; Dkt. 52, Declaration of Patrick J. Smith (“Smith Decl.”), at 1.

**A. 2013**

Herron testified as CSCP’s corporate representative that CSCP acquired the CrawlPros.com domain name “either in the end of 2012 or the beginning of 2013.” Dkt. 121, Ex. 2 at 211. CSCP began operations at a single location in Tacoma in early 2013. Herron declares that it used Slogan One extensively to brand its business. *See* Herron Decl. at 6–41; Dkt. 120 at 2. Herron testified as CSCP’s corporate representative that an employee named Paul came up with Slogan One in “April, May, around that time frame, in 2013” as Paul was finishing out his time with CSCP before moving to Australia. Dkt. 121 at 79–80.

CCI Vice President Dale Gjerness testified that he became aware of CSCP’s existence by “2014, 2013, somewhere in there.” Dkt. 123, Ex. 1 at 49. CCI General Manager Andrew Gjerness testified as CCI’s corporate representative that CCI first

1 became aware that CSCP used the name Crawl Space Cleaning Pros “sometime in mid-  
2 2013, around the summer,” because salesmen “down in that area” including Pullen and  
3 Henrichsen heard that Herron had started a new company and was operating under that  
4 name. Dkt. 121, Ex. 2 at 11.

5 In 2013, CSCP placed Slogan One in advertising including an Angie’s list ad, on  
6 company cars and trucks, and on its company headquarters. Herron Decl. at 6–24. CSCP  
7 opened its second location in Everett, Washington sometime between 2013 and 2016.  
8 Dkt. 120 at 2 & n.6 (citing Dkt. 119, Ex. A at 131).<sup>1</sup> Between 2013 and 2019, Herron  
9 testified, CCI and CSCP would have both been required to have industry representatives  
10 present at annual meetings for three utility companies—Tacoma Power, Puget Sound  
11 Energy, and Snohomish County Public Utility District. Dkt. 121, Ex. 5 at 64. Henrichsen  
12 testified that he saw Herron at Tacoma Power and Puget Sound Energy meetings. Dkt.  
13 121, Ex. 4 at 86. Herron also testified that during that span “[t]here could be times at the  
14 Seattle Home Show where [CCI does] show up and have a booth that [CSCP] would have  
15 a booth too.” *Id.* Henrichsen testified that the Seattle Home Show occurs twice a year but  
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18 <sup>1</sup> Dkt. 119 is filed under seal. Ex. A contains the material referenced in Dkt. 121, Ex. 1,  
19 and Ex. B contains the material referenced in Dkt. 121, Ex. 8. CSCP’s motion states that CSCP  
20 opened its second location in Everett, Washington in 2013. Dkt. 120 at 2. The underlying  
21 citation, filed under seal, shows that when Herron as CSCP’s corporate representative was asked  
22 at deposition in 2019 when CSCP moved to Everett, he replied “[t]hat would have been two and  
a half years ago.” Dkt. 119, Ex. A at 131. CCI also argues that CSCP expanded to Everett in  
2016. Dkt. 122 at 5. The Court also notes that though the referenced portion of Herron’s 30(b)(6)  
deposition was submitted under seal, the Court finds no reason to redact this information in this  
order. If a party disagrees with this conclusion, it may file a motion to seal this portion of this  
order.

1 CCI “didn’t always do it twice a year. Most of the time we did it, but not always.” Dkt.  
2 121, Ex. 4 at 76.

3 **B. 2014**

4 Herron testified as CCI’s corporate representative that in Spring 2014, he was at  
5 the Seattle Home Show at CSCP’s booth, and Henrichsen came by the booth. Dkt. 121,  
6 Ex. 2 at 64. Herron testified that Henrichsen looked at a banner on the booth which  
7 featured Slogan One, read Slogan One out loud to Herron, and told Herron “[t]hat’s a  
8 great slogan, Richard.” *Id.* Herron testified that the spring Home Show was usually held  
9 in March or April. *Id.* at 65. Henrichsen testified that his guess was the first time he saw  
10 CSCP at the show was in 2013 or 2014, “[s]omewhere around the time” that CSCP  
11 started and testified that he would see CSCP’s banners. Dkt. 121, Ex. 4 at 76–77. When  
12 asked in deposition if he ever complimented Herron on his booth, Henrichsen replied  
13 “Maybe.” Dkt. 121, Ex. 4 at 78. Henrichsen declared that he never saw Slogan One at the  
14 Home Show and declared that if he had, he would have complained about it. Dkt. 122 at  
15 5 (citing Second Henrichsen Decl., ¶ 3). Henrichsen also declared that he never  
16 complimented Herron on CSCP’s use of Slogan One. *Id.* (citing Second Henrichsen  
17 Decl., ¶ 4).

18 In 2014, according to Herron’s testimony, he was approached by Pullen at an  
19 industry show. Dkt. 121, Ex. 5 at 55–56.<sup>2</sup> Pullen told Herron he had planned to leave CCI  
20 to start his own business but that plan had failed and CCI had reassigned his territory, so

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21 <sup>2</sup> In response to interrogatory, CCI stated that Pullen and the other employees left in  
22 2013. Dkt. 121, Ex. 9 at 7.

1 he was interested in a position with CSCP. *Id.* Herron conducted two interviews with  
2 Pullen “probably in February or March of 2014” and then hired him as CSCP’s sales  
3 manager “in 2014.” *Id.* at 56. Pullen worked for CSCP “for approximately six months  
4 before [CCI] hired him back.” *Id.* at 56–57. Herron testified that at an unspecified point,  
5 Henrichsen told him he “could use [CCI’s Project Graph] to create my own graph as long  
6 as [Herron] changed it up some.” Dkt. 127 at 88–89.<sup>3</sup> Herron as CSCP’s corporate  
7 representative testified that Pullen created CSCP’s venting calculator. Dkt. 119 at 184–  
8 85.<sup>4</sup>

9       Henrichsen testified that approximately fifteen employees left CCI around the time  
10 Pullen left and when they came back some three weeks later, told him they had been  
11 working at CSCP. Dkt. 121, Ex. 4 at 71. He declared that this episode constituted “a  
12 major disruption to our business in the southern branch.” Henrichsen Decl. at 5. Herron  
13 testified as CSCP’s corporate representative that “somewhere around March, April” of  
14 2014, fifteen CCI employees came to CSCP seeking employment because CCI reduced  
15 their commissions and he hired three of them. Dkt. 119 at 168–69.<sup>5</sup> Herron also testified  
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19       <sup>3</sup> Dkt. 127 contains additional pages of Herron’s deposition inadvertently omitted from  
20 Dkt. 121, Ex. 5. The Court’s pincites for Dkt. 127 are to the page numbers of Herron’s  
deposition transcript.

21       <sup>4</sup> Although this information was submitted under seal, the Court finds no reason to redact  
this information in this order. If a party disagrees with this conclusion, it may file a motion to  
seal this portion of this order.

22       <sup>5</sup> See footnote 4.

1 that during a conversation after a Tacoma Power annual meeting, Henrichsen told him  
2 that most of these employees returned to CCI. Dkt. 119 at 169.<sup>6</sup>

3 Henrichsen testified that when Pullen returned to CCI as an employee, he told  
4 Henrichsen that CSCP had copied CCI's "project worksheet, bid sheet, the venting  
5 calculator and the project graph." Dkt. 121, Ex. 4 at 114. Henrichsen testified that other  
6 salesmen had also told him about the copying, but he did not know if it was before or  
7 after Pullen returned as an employee. *Id.* at 114–15. Henrichsen testified that a particular  
8 salesman, Jeff Young, told him "[a] couple of years ago, maybe" that CSCP copied CCI's  
9 project worksheet. *Id.* at 116. In response to a series of questions about which salesmen  
10 had notified him about copying of particular documents, Henrichsen confirmed these  
11 conversations had all occurred a couple of years ago. *Id.* at 117. Henrichsen testified that  
12 he did not discuss this copying with Herron when he learned of it because he prefers to  
13 "just focus on my own business and move ahead, that's why. I try to ignore the  
14 competition and do what I need to do to take care of my employees and my customers."  
15 *Id.*

### 16 **C. 2014–2016**

17 Herron, as CCI's corporate representative, testified that between 2014 and 2015  
18 Henrichsen was president of the Washington Weatherization Association ("WWA"). Dkt.  
19 121, Ex. 5 at 64.<sup>7</sup> Henrichsen testified this was "an association of your insulation

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20 <sup>6</sup> See footnote 4.

21 <sup>7</sup> CSCP submits a printout of an internet search for Henrichsen's LinkedIn profile, which  
22 lists under "Organizations" that Henrichsen was president of the Washington Weatherization  
Association starting in March 2014. Dkt. 121, Ex. 10.

1 contractors” which he joined “because every business owner wants to be able to share  
2 and try to help each other out to grow a business.” Dkt. 121, Ex. 4 at 36. When asked if  
3 he had conversations with Herron about CSCP after CSCP began operations, Henrichsen  
4 testified “we would run into each other when I was on the way out from the  
5 Weatherization Association.” Dkt. 121, Ex. 4 at 85.

6 Andrew Gjerness as CCI’s corporate representative testified that CCI first “heard  
7 stuff” in 2015 or 2016 on the topic of CSCP’s using CCI’s Project Graph. Dkt. 123, Ex. 3  
8 at 42. He testified that Henrichsen “might have heard a rumor or two, but he thought  
9 nothing of it, that they were using our stuff.” *Id.*

10 Between 2014 and 2017, CSCP expanded its use of Slogan One to include  
11 business cards, customer giveaways, a domain name, advertising, its payment  
12 authorization form, and company jackets. Herron Decl. at 25–41. In late 2016, CSCP  
13 opened a third location in Marysville, Washington. Dkt. 120 at 2.

14 When asked if he had ever seen CSCP’s advertising prior to March 2017, Dale  
15 Gjerness testified “I may have seen a truck going down the freeway or so, but not looking  
16 at the website, nothing.” Dkt. 121, Ex. 6 at 76. He also testified that at a meeting at some  
17 point prior to March 2017 he saw a CSCP employee wearing “either a green jacket or a  
18 green shirt - - and it said Crawl Pros - - it must have been Crawl Space Cleaning Pros.”  
19 *Id.* at 77.

#### 20 **D. 2017**

21 On March 20, 2017, CSCP applied to register Slogan One in Washington as a  
22 trademark in class 37, registering it for use with “[c]leanup of crawl spaces and attics and



1 insulation installation services.” Dkt. 41, Declaration of Emilia L. Sweeney (“Sweeney  
2 Decl.”) at 5–14. Also in March 2017, Herron declares that CSCP “learned that CCI had  
3 begun using [Slogan One] on CCI’s website,” and so asked CCI to cease and desist.  
4 Herron Decl. at 3–4. Herron declares that CSCP received a favorable response but later  
5 found that CCI “had added a TM to the end of [Slogan One] and was also using the  
6 confusingly similar [Slogan Two] on its website.” *Id.* Andrew Gjerness as CCI’s  
7 corporate representative testified that CCI first became aware CSCP had used Slogan One  
8 when CCI received the cease and desist letter from CSCP sometime in March or April of  
9 2017. Dkt. 123, Ex. 3 at 12–13. Andrew Gjerness also testified that in May, June, or July  
10 of 2017, a new sales manager at CCI, Mike Tutsie, “got competitive bids from quite a  
11 few of our competitors to kind of understand how the process was” which was the first  
12 time CCI “actually saw” that CSCP was using CCI’s documents, specifically the Project  
13 Graph and Project Bid Sheet. Dkt. 123, Ex. 3 at 20, 42, 53, 56.

14 On July 6, 2017, CCI submitted an application for protection of Slogan One with  
15 the United State Patent and Trademark Office (“USPTO”). Dkt. 57-1 at 51. CSCP also  
16 filed for protection of Slogan One with the USPTO, which issued a Notice of Publication  
17 on July 12, 2017, announcing its intent to register Slogan One to CSCP. Sweeney Decl. at  
18 15–24. Andrew Gjerness as CCI’s corporate representative testified that in June or July  
19 2017, CCI became aware through checking social media to compare competitor’s  
20 advertisements that CSCP was changing their name to Crawl Pros. Dkt. 121, Ex. 3 at 12.  
21 Herron testified as CSCP’s corporate representative that CSCP changed its name because  
22 it was entering the Portland, Oregon market in August of 2017 and because it owned the

1 CrawlPros.com domain name. Dkt. 121, Ex. 2, at 211. Herron also testified as CSCP  
2 President that CSCP's goal was to entirely switch the name under which CSCP does  
3 business from Crawl Space Cleaning Pros to Crawl Pros by the end of 2019. Dkt. 123,  
4 Ex. 4 at 31.

5 On August 14, 2017, CSCP filed a complaint against CCI in the Pierce County  
6 Superior Court for the State of Washington for violation of Washington's Trademark  
7 Registration Act, RCW Chapter 19.77 *et seq.*, common law trademark infringement, and  
8 violation of Washington's Consumer Protection Act ("CPA"), RCW Chapter 19.86. Dkt.  
9 39 at 5. On September 6, 2017, CCI filed this lawsuit against CSCP, alleging copyright  
10 infringement, trademark infringement, false designation of origin and unfair competition  
11 in violation of the CPA, and seeking a permanent injunction against infringement of the  
12 copyrighted materials and the trademarked materials, destruction of all infringing  
13 materials, damages, and other relief. Dkt. 1. On October 10, 2017, CCI registered Slogan  
14 Two as a service mark with the USPTO. Dkt. 57-1 at 53. On November 28, 2017, CCI  
15 filed a Notice of Opposition to CSCP's application for protection of Slogan One with the  
16 federal Trademark Trial and Appeal Board, Sweeney Decl. at 26–31, citing CCI's July 6  
17 application for protection of Slogan One, *see* Dkt. 57-1 at 51.<sup>8</sup>

18 On March 19, 2018, CSCP filed an amended answer in the instant case, asserting  
19 counterclaims and affirmative defenses including laches. Dkt. 32. On September 6, 2018,  
20 CSCP filed a motion for summary judgment. Dkt. 39. On January 29, 2019, the Court

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21 <sup>8</sup> CSCP informed the Court that this proceeding is suspended pending the outcome of the  
22 instant suit. Dkt. 39 at 4.

1 granted the motion as to CCI's copyright claims for two of the five copyrighted  
2 documents at issue. Dkt. 75 at 40. The Court denied summary judgement as to CCI's  
3 trademark claims, and reserved ruling and requested supplemental briefing as to CCI's  
4 copyright claims for the remaining three documents, a Project Graph, a Project Bid Sheet,  
5 and a Venting Calculator. *Id.* On March 1, 2019, in response to CSCP's request for a  
6 continuance, Dkt. 86, and CCI's notice of non-opposition, Dkt. 101, the Court granted the  
7 motion for a continuance and struck the scheduling order based on the then-existing trial  
8 date. Dkt. 105. On May 31, 2019, the Court ruled on the remaining questions from  
9 CSCP's motion for summary judgment and granted summary judgment only as to the  
10 second page of the Venting Calculator document and denied summary judgment as to the  
11 remainder of the motion. Dkt. 112.

12 On July 11, 2019, CSCP filed its second motion for partial summary judgment.  
13 Dkt. 120. On July 29, 2019, CCI responded. Dkt. 122. On August 2, 2019, CSCP replied.  
14 Dkt. 126.

15 On August 6, 2019, CCI filed a motion for leave to file Dkt. 128, Second  
16 Henrichsen Declaration. Dkt. 129. CSCP did not respond.

17 On September 25, 2019, in response to the parties' joint status reports, the Court  
18 set a new trial date and new pretrial deadlines including a new dispositive motions  
19 deadline of October 16, 2019. Dkt. 136.  
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## II. DISCUSSION

### A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically

1 attested by that party contradict facts specifically attested by the moving party. The  
2 nonmoving party may not merely state that it will discredit the moving party's evidence  
3 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*  
4 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,  
5 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
6 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).

7 **B. Motion for Leave to File the Second Henrichsen Declaration**

8 In its motion, CCI explains that though the substance of the Second Henrichsen  
9 Declaration was extensively cited in its opposition papers, Dkt. 122, CCI's counsel  
10 inadvertently did not include the declaration in its supporting exhibits. Dkt. 129 at 1. CCI  
11 asks the Court for leave to file the declaration. *Id.* CSCP did not respond to the motion.  
12 CCI explains that on August 5, 2019 when it discovered the error, it notified CSCP and  
13 served the declaration immediately, though this occurred after CSCP's reply was due and  
14 filed. *Id.* at 2. CCI argues and provides a supporting declaration that CSCP's counsel  
15 confirmed by phone it would not be prejudiced by the error. *Id.*; Dkt. 130, ¶ 5.

16 Federal Rule of Civil Procedure 6(b)(1)(B) provides that when an act must be  
17 performed within a specified time, a court may for good cause extend the time “on  
18 motion made after the time has expired if the party failed to act because of excusable  
19 neglect.” Neglect includes negligence and inadvertence. *Briones v. Riviera Hotel &*  
20 *Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (citing *Pioneer Inv. Servs. Co. v. Brunswick*  
21 *Assocs. Ltd. P'ship*, 507 U.S. 380, 391 (1993)). Whether neglect is “excusable” in  
22 motions under Rule 6(b) should be determined by (1) the danger of prejudice to the

opposing party, (2) the length of the delay and its impact on the proceedings, (3) the reason for the delay, and (4) whether the movant acted in good faith. *Id.* (citing *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814 (9th Cir. 1996)). Here, the Court finds no evidence of prejudice, a lack of identifiable impact on the proceedings (as it appears the substance of the declaration was clear from CCI's motion), and no indication of bad faith. To avoid potential prejudice to CSCP, the Court will rely on the substance of the declaration as represented in CCI's motion—the substance that was available to CSCP in crafting its reply. Therefore, the Court grants CCI's motion for leave to file the Second Henrichsen Declaration, Dkt. 129.

## **C. Merits**

CSCP asks the Court to grant summary judgment on all of CCI's remaining trademark claims and on all equitable relief sought for CCI's remaining copyright claims based on CSCP's affirmative laches defense.

### **1. Trademark Claims**

In its complaint, CCI makes three primary trademark allegations: (1) that CSCP's trade name Crawl Space Cleaning Pros creates a strong likelihood of consumer confusion with CCI's trade name Clean Crawls, (2) that CCI has the rights to Slogan One and CSCP's use of Slogan One directly infringes on those rights, and (3) that CSCP's use of Slogan One creates a likelihood of confusion with and thus infringes CCI's rights in Slogan Two. Dkt. 1, ¶¶ 15–20, 24–27.

In its previous motion for partial summary judgment, CSCP argued that all of CCI's trademark claims were barred by laches based on the Henrichsen Declaration and

1 the Declaration of Dale Gjerness, Dkt. 50. *See* Dkt. 75 at 27. The Court found that neither  
2 declaration clearly established CSCP's contention that CCI knew of CSCP's alleged  
3 trademark infringement since 2012. *Id.* CSCP moves again for summary judgment on  
4 laches arguing that additional discovery bolsters its case, including deposition testimony  
5 from CCI's corporate representative Andrew Gjerness and from Henrichsen, CCI's  
6 President. Dkt. 120 at 1.

7       The parties now also raise the issue that any CCI allegations about CSCP's shift to  
8 the trade name Crawl Pros are not addressed in CCI's complaint. While CCI argues that  
9 these allegations are already contemplated as part of this case, it requests leave to  
10 supplement its pleadings pursuant to Fed. R. Civ. P. 15(d) should the Court find it  
11 necessary. Dkt. 122 at 24. CSCP argues, and the Court agrees, that plaintiffs may not  
12 supplement their complaints to avoid summary judgment. Dkt. 126 at 11–12. *See, e.g.*  
13 *Glesenkamp v. Nationwide Mut. Ins. Co.*, 71 F.R.D. 1 (N.D. Cal. 1974), *aff'd per curiam*,  
14 540 F.2d 458 (1976) (“The liberal amendment policy of the Federal Rules was not  
15 intended to allow a party to circumvent the effects of summary judgment by amending  
16 the complaint every time a termination of the action threatens.”). However, this Order  
17 does not terminate the action, and CCI may file a motion to amend or supplement as it  
18 finds appropriate. The Court will assess the equities of amendment if CCI files such a  
19 motion. The Court will not analyze CCI's claims regarding CSCP's use of the trade name  
20 Crawl Pros because it is now clear that those claims are outside the pleadings and thus  
21 not properly before the Court.  
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1           **a.       Knowledge and the Presumption of Laches**

2           “To establish that laches bars a claim, a defendant must ‘prove both an  
3 unreasonable delay by the plaintiff and prejudice to itself.’” *Eat Right Foods Ltd v. Whole*  
4 *Foods Market, Inc.*, 880 F.3d 1109, 1116 (9th Cir. 2018) (“*Eat Right*”) (quoting  
5 *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1226 (9th Cir. 2012)).  
6 “Determining whether a delay was unreasonable requires answering two questions: how  
7 long was the delay, and what was the reason for it?” *Id.* (citing *Jarrow Formulas, Inc. v.*  
8 *Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir. 2002)). “To measure the length of a  
9 delay, we start the clock ‘when the plaintiff knew (or should have known) of the  
10 allegedly infringing conduct,’ and we stop it when ‘the lawsuit in which the defendant  
11 seeks to invoke the laches defense’ is initiated.” *Id.* (quoting *Evergreen Safety Council*,  
12 697 F.3d at 1226). “If the most analogous state statute of limitations expired before the  
13 suit was filed, there is a strong presumption in favor of laches.” *Pinkette Clothing, Inc. v.*  
14 *Cosmetic Warriors Limited*, 894 F.3d 1015, 1025 (9th Cir. 2018). Conversely, “[i]f the  
15 plaintiff filed suit within the analogous limitations period, the strong presumption is that  
16 laches is inapplicable.” *Jarrow*, 304 F.3d at 835–36 (citation omitted).

17           The parties do not dispute and the Court agrees that the most analogous state  
18 statute of limitations for the trademark infringement claims is Washington’s three-year  
19 statute of limitations on claims for trade name infringement. *See* Dkt. 120 at 10; Dkt. 122  
20 at 11 (“CSCP must show that CCI ‘knew or should have known’ it had a cause of action  
21 against CCP for trademark infringement . . . sometime before September 6, 2014.”); *see*  
22 *also Eat Right*, 880 F.3d at 1115 (parties agreed Washington’s three-year statute of



1 limitations for trade name infringement was analogous for Lanham Act trade name  
2 claims). CCI filed suit on September 6, 2017. Dkt. 1. Thus if CCI knew or should have  
3 known of CSCP's alleged infringement prior to September 6, 2014, the presumption is  
4 that laches applies.

5       “The essence of [a trademark infringement claim] centers on the likelihood of  
6 confusion between two marks or products.” *Internet Specialties W., Inc. v. Milton-*  
7 *DiGiorgio Enters., Inc.*, 559 F.3d 985, 990 (9th Cir. 2009) (citing *GoTo.com, Inc. v. Walt*  
8 *Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000); *Brookfield Comms., Inc. v. W. Coast*  
9 *Entm't Corp.*, 174 F.3d 1036, 1053 (9th Cir. 1999)). “Thus, the question is whether [the  
10 plaintiff] knew or should have known about the likelihood of confusion between its mark  
11 and [the defendant's] mark.” *Id.* Actual knowledge of infringement is not required; the  
12 Ninth Circuit explained “[o]n multiple occasions, we have held that laches barred an  
13 otherwise meritorious trademark or copyright claim because the plaintiff had constructive  
14 knowledge of potentially infringing activity outside the limitations period.” *Id.* (citing  
15 *Evergreen Safety Council*, 697 F.3d at 1227; *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d  
16 975, 999 (9th Cir. 2006); *E-Systems, Inc. v. Monitek, Inc.*, 720 F.2d 605, 607 (9th Cir.  
17 1983) (“*E-Systems*”).

18       While CSCP argues that the Court may proceed to a laches analysis even if a  
19 dispute of material fact exists about when CCI knew or had reason to know about  
20 potentially infringing activity, Dkt. 126 at 4, the Court must not resolve a dispute of  
21 material fact in favor of the moving party at summary judgment. *See, e.g., Jarow*, 304  
22 F.3d at 833–34 (“we review de novo whether the district court inappropriately resolved

1 any disputed material facts in reaching its decision.”). However, the Court may exercise  
2 discretion in applying the laches doctrine to the facts. *Eat Right*, 880 F.3d at 1115.

3 The parties dispute whether and when CCI knew or had reason to know of CSCP’s  
4 infringement and also dispute whether the laches period should be established separately  
5 for each mark at issue. Neither party cites authority on the issue of separate analyses.  
6 CSCP appears to argue that laches should be decided jointly as to all of CCI’s trademark  
7 infringement claims. *See* Dkt. 126 at 3 (“CCI further asserts that CSCP must satisfy the  
8 Ninth Circuit’s laches analysis for each and every concomitant use of the three marks or  
9 trade names at issue.”) (footnote omitted). Because each trademark represents a property  
10 right, the Court will analyze each mark separately. *See New Kids on the Block v. News*  
11 *Am. Pub., Inc.*, 971 F.3d 302, 306 (9th Cir. 1992) (“A trademark is a limited property  
12 right in a particular word, phrase, or symbol.”).

13 The parties’ dispute about whether constructive knowledge should be imputed to  
14 CCI includes an apparent disagreement about what standard the Court should use to  
15 makes its determination. In discussing constructive knowledge, CSCP emphasizes CCI’s  
16 lack of reasonable diligence and failure to police its marks, arguing that “a reasonably  
17 prudent business person seeking to police its marks in Henrichsen’s position” would have  
18 recognized the likelihood of confusion as early as mid-2013 when he became aware of  
19 CSCP’s operations and should have taken steps to enforce CCI’s rights. Dkt. 120 at 13–  
20 14. CCI counters that “given that CSCP’s admitted significant expansion and growth did  
21 not occur until 2016, the evidence—viewed it [sic] the light most favorable to CCI—  
22

1 confirms that a possible knowledge . . . whether actual or constructive, would not have  
2 occurred prior to 2016 at the earliest.” Dkt. 122 at 12.

3        Though the concept of what a plaintiff “should have known” could on its terms  
4 include what a reasonable person should have done to investigate possible infringement,  
5 the Court finds that courts conduct this analysis in the context of the *E-Systems* factors  
6 courts use to assess the equity of a laches defense. *See, e.g. Pinkette Clothing*, 894 F.3d at  
7 1027 (In finding plaintiff was not diligent, the Ninth Circuit reasoned “[e]ven though  
8 [plaintiff’s] outside counsel received notice of [defendant’s] registration application, and  
9 even though [plaintiff] otherwise strictly polices its mark, [plaintiff] waited . . . to file its  
10 petition for cancellation.”).

11        The Court finds that Ninth Circuit analysis of constructive knowledge to start the  
12 laches clock considers actions a plaintiff took or information they were exposed to based  
13 on the plaintiff’s actions during the period of infringement, not actions a plaintiff should  
14 have taken to gather knowledge but did not. In *Eat Right*, the Circuit found constructive  
15 knowledge when the plaintiff had an ongoing business relationship with the defendant,  
16 the defendant publicized the program incorporating the allegedly infringing mark on its  
17 website, the plaintiff’s managing director visited one of the defendant’s stores when the  
18 mark was displayed, referenced a campaign with the mark in e-mails to defendant’s staff,  
19 and knew an entity affiliated with the defendant had attempted to register the mark. 880  
20 F.3d at 1116–17. In *Internet Specialties*, the Circuit found a plaintiff should have  
21 recognized the likelihood of confusion between company names and thus possessed  
22 constructive knowledge when, though their service lines did not entirely overlap, the

1 companies offered many of the same services “in the same geographic area under  
2 remarkably similar names.” 559 F.3d at 990. In *Tillamook Country Smoker, Inc. v.*  
3 *Tillamook Cty. Creamery Ass’n*, 465 F.3d 1102, 1109 (9th Cir. 2006), defendant sold  
4 plaintiff’s complimentary products through its “catalog, factory store, and website” for  
5 more than twenty years. The Ninth Circuit rejected the argument that laches should be  
6 delayed until the products shared the same primary channel of distribution, finding actual  
7 knowledge was present, and likelihood of confusion was or should have been recognized  
8 when “the two companies were using similar marks on complimentary products in the  
9 same geographical area, creating the prospect of confusion.” *Id.* In *Miller*, where  
10 plaintiffs the Millers alleged defendant Glenn Miller Productions (“GMP”) was  
11 improperly sub-licensing plaintiffs’ intellectual property without permission, the Ninth  
12 Circuit found that:

13 [T]he Millers’ status as GMP shareholders, their involvement in GMP  
14 matters since 1979, Steven Miller’s attendance at six Glenn Miller  
15 Orchestra performance since the early 1990s at which merchandise was  
16 advertised and sold in prominent locations, Steven Miller’s admitted  
17 knowledge that GMP sold CDs at one such concert, and GMP’s open and  
notorious sale of merchandise on its website were more than sufficient to  
give Plaintiffs constructive knowledge that during the 1980s and 1990s  
(and in any case, long before January 1999), GMP was selling merchandise  
bearing the Glenn Miller Orchestra mark.

18 *Miller*, 454 F.3d at 999. In *E-Systems*, the Circuit found that “[b]ecause plaintiff and  
19 defendant advertised in the same magazines and exhibited at the same trade fairs, plaintiff  
20 had ample opportunity to discover defendant’s activities [using a confusingly similar  
21 trade name] before defendant developed a substantial business.” 720 F.3d at 607.  
22

1       Regarding what occurred to expose CCI to CSCP's actions, CSCP argues that CCI  
2 had actual knowledge of infringement of CCI's trade name and of Slogan One as early as  
3 mid-2013 and certainly by Spring 2014. Dkt. 120 at 12. CSCP emphasizes three points:  
4 (1) CCI's corporate representative testified that CCI was aware in mid-2013 that CSCP  
5 was doing business, (2) Henrichsen testified that he attended the Seattle Home Show  
6 sometime in 2013 or 2014 and saw CSCP's booth and the banners on its booth, and (3)  
7 Herron testified that when he was working at CSCP's Seattle Home Show booth in  
8 Spring 2014, Henrichsen came by the booth, read Slogan One out loud from a banner on  
9 the booth, and told Herron it was a great slogan. *Id.*

10       While CSCP relies on its allegation that CCI had actual knowledge of CSCP's  
11 trade name by mid-2013 and Henrichsen had actual knowledge of CSCP's use of Slogan  
12 One by the spring of 2014 (as analyzed below), it raises five additional points in support  
13 of its argument that the Court should at least find CCI had constructive knowledge of the  
14 alleged infringement prior to September 6, 2014. These points are: (1) that Henrichsen  
15 served as president of the WWA in 2014 and should be presumed aware of the WWA's  
16 members, (2) that employees transferred between CCI and CSCP in 2014, (3) that the  
17 companies had "various interactions at trade and industry meetings," (4) that Dale  
18 Gjerness of CCI testified that he observed CSCP trucks and uniforms, and (5) that  
19 Henrichsen testified that he learned of CSCP's infringement "a couple of years ago." Dkt.  
20 120 at 14 (citing Dkt. 40, ¶ 22; Dkt. 121, Ex. 4 at 36, 85, 86, 116, Ex. 5 at 56–57, 63, 64,  
21 Ex. 6 at 76–77; Dkt. 119, Ex. A at 168–69). The Court summarizes CCI's  
22 counterarguments as follows: (1) Henrichsen's knowledge of CSCP's membership in the

1 WWA did not necessarily expose him to CSCP’s use of marks in commerce as required  
2 for a trademark claim, (2) employees who went to CSCP and later returned to CCI may  
3 have returned after September 6, 2014; in any event, this employee crossover did not  
4 necessarily expose CCI to CSCP’s use of marks, (3) attendance at industry meetings does  
5 not clearly entail exposure to CSCP’s use of marks, (4) Dale Gjerness testified that he  
6 may have seen a CSCP truck *at some point prior to March 2017* and that *at some point* he  
7 saw a CSCP employee in a jacket or a shirt at a meeting that said Crawl Space Cleaning  
8 Pros, none of which establish exposure before September 6, 2014, and (5) Henrichsen’s  
9 testimony was in 2019, so testimony that he learned of infringement “a couple of years  
10 ago” did not reference a date prior to September 6, 2014. *See* Dkt. 122 at 12–13. The  
11 Court considers these facts in the context of CCI’s argument that it “did not know, and  
12 did not have reason to know, that CSCP was using its company name *in its branding as a*  
13 *trademark* until years later.” Dkt. 122 at 11–12 (emphasis added). Though it is somewhat  
14 of a close question, the Court finds that none of these facts clearly establish CCI was  
15 exposed to CSCP’s use of marks between CSCP’s inception in mid-2013 and the  
16 operative date of September 6, 2014.

17 The Court turns next to the interaction between Herron and Henrichsen at the  
18 Seattle Home Show. CCI “hotly dispute[s]” Herron’s account of his interaction with  
19 Henrichsen at the Seattle Home Show. Dkt. 122 at 4. The Court finds the facts regarding  
20 the Seattle Home Show interaction are as follows. Herron testified that Henrichsen read  
21 Slogan One off the banner. Dkt. 121, Ex. 2 at 64. Henrichsen declared that he did not do  
22 so. Dkt. 122 at 5 (citing Second Henrichsen Decl., ¶ 3). While Henrichsen denies having

1 | seen Slogan One, Herron's testimony is some evidence that the Slogan was displayed on  
2 | a banner at the Home Show.<sup>9</sup> While Henrichsen's declaration creates a question of fact  
3 | about whether Henrichsen saw Slogan One, Henrichsen testifies (and does not dispute in  
4 | declaration) that he the first time he saw CSCP at the Seattle Home Show would have  
5 | been at some point in 2013 or 2014. *Compare* Dkt. 123, Ex. 2 at 77 *with* Dkt. 122 at 5  
6 | (citing Second Henrichsen Decl., ¶ 3). Construing all facts in favor of CCI, because the  
7 | Seattle Home Show occurs twice a year, this interaction could have occurred in the fall of  
8 | 2014. Dkt. 122 at 4. Because neither party provides the date of the Seattle Home show in  
9 | the fall of 2014, this interaction could have occurred sometime later than September 6,  
10 | 2014.

11 |         From these facts, the Court makes the following determinations. CSCP has put  
12 | forward evidence that Slogan One was displayed on a banner at CSCP's booth at the  
13 | Home Show, sometime during 2013 or 2014 when Henrichsen was there and aware of  
14 | CSCP's presence. While CCI's evidence creates a question of material fact about whether  
15 | Henrichsen actually observed Slogan One, it does not contradict CSCP's evidence about  
16 | whether Slogan One was displayed in Henrichsen's presence. However, CCI's evidence  
17 | also creates a question of fact about whether Slogan One was displayed in Henrichsen's  
18 | presence prior to September 6, 2014. Because this exposure could have occurred outside  
19 | the limitations period, and because the other interactions do not conclusively establish

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20 |  
21 |         <sup>9</sup> Herron's declaration in support of CSCP's first motion for summary judgment explains  
22 | that CSCP purchased a 2' x 8' banner with Slogan One at the top prior to the June 2013 Mother  
Earth News Festival and includes a photograph of the booth displaying the banner and a receipt  
for the banner dated May 23, 2013. Dkt. 40, ¶ 6 (citing Ex. B).

1 CCI's exposure to CSCP's use of Slogan One, the Court finds that constructive  
2 knowledge of CSCP's use of Slogan One may not be clearly imputed to CCI before  
3 September 6, 2014.<sup>10</sup>

4        Though CCI appears to dispute its knowledge of the extent of CSCP's operations,  
5 it does not dispute its leadership knew Herron had started a business with the name Crawl  
6 Space Cleaning Pros by the middle of 2013. Herron and Henrichsen were known to each  
7 other, and it appears undisputed that the businesses offered substantially the same  
8 services from CSCP's inception. The precise geographic outlines of each company's  
9 service area between mid-2013 and September 6, 2014 are not clear from the record, but  
10 both companies appear to have operated at that time in Northwestern Washington. CCI  
11 argues that actual customer confusion did not occur "until years later, after CSCP had  
12 grown, at which point a claim for trademark infringement accrued . . . ." Dkt. 122 at 12.  
13 However, actual customer confusion is only one of the eight factors which a court  
14 considers in a claim of trademark infringement, and a plaintiff can prove a claim without  
15 actual evidence of customer confusion. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–  
16 49 (9th Cir. 1979).

17        Thus, the question is whether CCI should have known in the relatively brief period  
18 between mid-2013 and September 6, 2014 that there was a likelihood of confusion  
19 between two companies with similar names offering the same services in much the same  
20

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21        <sup>10</sup> CCI certainly had actual knowledge of CSCP's use of Slogan One by the spring of  
22 2017 when CCI received CSCP's cease-and-desist letter, Dkt. 123, Ex. 3 at 12–13, but this point  
is well past the limitations period.



1 locations without any definitively established instances where CCI's leadership was  
2 exposed to CSCP's use of its name as a trade name. The answer requires determining  
3 whether CCI should have heard CSCP's name, undertaken an investigation (however  
4 minor) to determine how CSCP was using its name in commerce, and with that  
5 information, evaluated its potential cause of action. *Jarrow*, 304 F.3d at 838. Though it is  
6 again a close question, the Court concludes that particularly with the uncertainty of the  
7 date of the trade show as discussed (where Henrichsen would have been exposed to  
8 CSCP's use of its name in commerce) there is not a date prior to September 6, 2014 at  
9 which it may clearly assign constructive knowledge of CSCP's use of the Crawl Space  
10 Cleaning Pros trade name in commerce to CCI.

11 Because other claims are going to the jury, the Court finds it is also appropriate to  
12 let the jury consider the factual questions at issue regarding knowledge. Though the Court  
13 finds constructive knowledge of both CSCP's trade name and Slogan One could be  
14 assigned to CCI at least by the end of 2014, that date could easily fall after September 6,  
15 2014. Therefore, the presumption is that laches does not apply to CCI's claim regarding  
16 CSCP's trade name or to CCI's claim regarding CSCP's use of Slogan One.

17 **b. Equity of A Laches Defense**

18 The presumption that laches applies may be rebutted if the plaintiff can show its  
19 delay was reasonable. *Eat Right*, 880 F.3d at 1117. While CSCP does not cite to authority  
20 so establishing, it appears that the presumption laches does not apply is also rebuttable in  
21 rare circumstances. *See Jarrow*, 304 F.3d at 835–36 (quoting *Shouse v. Pierce Cty.*, 669  
22 F.2d 1142, 1147 (9th Cir. 1997) (“It is extremely rare for laches to be effectively invoked

1 when a plaintiff has filed his action before limitations in an analogous action at law has  
2 run.”)).

3 District courts balance six factors to determine if the trademark owner’s delay in  
4 filing suit was unreasonable and thus barred:

5 (1) strength and value of the trademark rights asserted; (2) plaintiff’s  
6 diligence in enforcing mark; (3) harm to senior user if relief is denied; (4)  
7 good faith ignorance by junior user; (5) competition between senior and  
junior users; and (6) extent of harm suffered by the junior user because of  
senior user's delay.

8 *Tillamook*, 465 F.3d at 1108 (quoting *E-Systems*, 720 F.2d at 607). The Court is doubtful  
9 that this case presents the rare circumstance where laches is appropriate when questions  
10 of fact preclude a conclusion that CCI filed outside the statute of limitations. However,  
11 because constructive knowledge could be attributed just outside the statute of limitations,  
12 the Court will briefly address the *E-Systems* factors.

13 Regarding the first factor, strength and value of the rights asserted, CSCP  
14 concedes that in light of the Court’s previous finding that a question of fact exists as to  
15 whether CCI’s mark is suggestive and that CCI put forward evidence of substantial  
16 advertising and sales, this factor does not weigh in CSCP’s favor. Dkt. 120 at 15 (citing  
17 Dkt. 75 at 9–15).

18 Regarding the second factor, diligence in enforcement, “[r]easonable justifications  
19 for a delay include exhausting remedies through administrative processes, evaluating and  
20 preparing complicated claims, and determining ‘whether the scope of proposed  
21 infringement will justify the cost of litigation.’” *Jarrow*, 304 F.3d at 835–36 (quoting  
22 *Evergreen Safety Council*, 697 F.3d at 1227). Courts have also recognized that plaintiffs

1 may legitimately put off filing suit when pursuing settlement negotiations with the  
2 alleged infringer. *Eat Right*, 880 F.3d at 1119. CCI does not put forward any reason  
3 courts have recognized as a legitimate excuse for its delay in filing suit.

4 CCI argues that it did not have reason to know about CSCP’s marketing efforts  
5 because “CSCP admittedly did not expand into CCI’s home territory until 2016, and did  
6 not experience significant company growth until 2017.” Dkt. 122 at 12. CCI argues that  
7 its delay was not unreasonable “considering all the activities that go into starting a  
8 business and the uncertainty as to how that business would perform.” *Id.* at 16. However,  
9 CCI does not argue that its leadership *in fact* delayed because they expected CSCP would  
10 fail, or believed that the scope of infringement would not justify the cost of litigation.  
11 *Jarrow*, F.3d at 835–36.<sup>11</sup>

12 CCI argues that it delayed in filing suit because it “had no reason to recognize its  
13 potential cause of action until it experienced actual confusion” and “promptly filed the  
14 present lawsuit against CSCP’s infringement in 2017 within months after its efforts at  
15 amicable settlement with CSCP broke down.” *Id.* at 17. However, actual confusion is not  
16 required to recognize a potential cause of action, and it is difficult to distinguish CCI’s  
17 own characterization of its conduct from what the Ninth Circuit has warned is  
18 impermissible—waiting “to see how successful the defendant’s business will be and  
19 then ask for an injunction to take away good will developed by defendant in the

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21 <sup>11</sup> In the copyright section of its motion, CCI explains that the Supreme Court in *Petrella*  
22 *v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) (“*Petrella*”) acknowledged that companies  
may wait to see whether the scope of infringement justifies the cost of litigation but does not  
explicitly argue that *CCI actually delayed* for this reason.

1 interim.” *Grupo Gigante SA De CV v. Dallo & Co.*, 391 F.3d 1088, 1102–03 (9th Cir.  
2 2004) (quoting 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair*  
3 *Competition*, § 31:14 (4th ed. 2002)).

4 Courts may also excuse delay in the face of progressive encroachment, when a  
5 senior owner waits until “the junior user of a mark moves into direct competition . . .  
6 selling the same ‘product’ through the same channels and causing actual market  
7 confusion.” *Tillamook*, 465 F.3d at 1110 (quoting *Prudential Ins. Co. of Am. v. Gibraltar*  
8 *Fin. Corp. of Cal.*, 694 F.3d 1150, 1154 (9th Cir. 1982)). “Common methods of  
9 encroachment are the junior user’s expansion of its business into different regions or into  
10 different markets.” *Id.* (citing *Grupo Gigante*, 391 F.3d at 1103). Conversely, “[a] junior  
11 user’s growth of its existing business and the concomitant increase in its use of the mark  
12 do not constitute progressive encroachment.” *Id.* (citing *Prudential Ins.*, 694 F.3d at  
13 1154). However, when potential conflict is anticipated, choosing to wait until conflict is  
14 actual rather than potential is “not an excuse and did not constitute progressive  
15 encroachment.” *Internet Specialties*, 559 F.3d at 991 (citing *Grupo Gigante*, 391 F.3d at  
16 1103). Here, where the two companies’ service lines were substantially similar from the  
17 start and CSCP operations were at least geographically contiguous to CCI’s from the  
18 start, normal business growth would very likely, and would reasonably be anticipated to  
19 more directly overlap with CCI’s most central service area. On the facts presented,  
20 progressive encroachment does not excuse CCI’s delay. Because CCI has failed to make  
21 a case that its delay was reasonable, this factor weighs substantially in favor of applying  
22 laches.

1       Regarding the third factor, harm to the senior user if relief is denied, the Court  
2 previously found that CCI put forward what appeared to be strong evidence of customer  
3 confusion, which negatively impacted customer perception of CCI’s reliability. Dkt. 75 at  
4 18. CSCP argues that “delay weakens a claim of a likelihood of confusion, because the  
5 public may learn to distinguish between similar marks over time . . . .” Dkt. 120 at 16  
6 (citing *Grupo Gigante*, 391 F.3d at 1103–04). CCI’s evidence of confusion, cited in the  
7 Court’s prior order, could support an inference that the public was not making this  
8 adjustment. Dkt. 75 at 18–19. Therefore, this factor weighs against applying laches.

9       Regarding the fourth factor, good faith ignorance by the junior user, CSCP argues  
10 that it used both its trade name and Slogan One widely in advertising throughout the  
11 Puget Sound, supporting an inference that it claimed its marks in good faith. Dkt. 120 at  
12 17. CCI counters that CSCP was aware CCI was using its trade name and Slogan One  
13 when CSCP adopted them. Dkt. 122 at 17. The Court previously found regarding the  
14 similar “defendant’s intent” factor that a reasonable juror could draw conflicting  
15 inferences on intent, making this factor neutral as to both the trade name and Slogan One.  
16 Dkt. 75 at 17–18. Moreover, the disputes of fact about priority of usage for Slogan One  
17 prevent clear resolution of knowledge and intent here—if a jury concludes CCI had  
18 priority in usage, this factor would weigh against laches.

19       Regarding the fifth factor, competition between senior and junior users, CSCP  
20 concedes that as it competes with CCI, this factor weighs against applying laches. Dkt.  
21 120 at 6.  
22

1       Regarding the sixth factor, harm suffered by the junior user because of the senior  
2 user's delay, courts consider that "[e]ven where a defendant establishes that a plaintiff  
3 delayed unreasonably in filing suit, laches will not bar a claim unless that delay  
4 prejudiced the defendant." *Eat Right*, 880 F.3d at 1117 (citing *Grand Canyon Trust v.*  
5 *Tucson Elec. Power Co.*, 391 F.3d 979, 988 (9th Cir. 2004)). While prejudice is part of  
6 the six-factor equitable analysis, a defendant must satisfy this factor to prevail and it  
7 weighs heavily in the analysis. *See id.* at 1119 (citing *Grand Canyon Trust*, 391 F.3d at  
8 988) ("Even where a defendant establishes that a plaintiff delayed unreasonably in filing  
9 suit, laches will not bar a claim unless that delay prejudiced the defendant.")).

10       In *Internet Specialties*, the Ninth Circuit explained that prejudice must stem from  
11 investing in the mark "as the identity of the business in the minds of the public," and  
12 considered whether the defendant would have to "undertake significant advertising  
13 expenditures to change its name." *Internet Specialties*, 559 F.3d at 992 (citing *Jarrow*,  
14 304 F.3d at 835–36). Later cases have considered a slightly broader concept of  
15 investment in the mark, to include investment in infrastructure and employment as  
16 examples of building a business around a trademark. *Pinkette Clothing*, 894 F.3d at 1028  
17 (citing *Grupo Gigante*, 391 F.3d at 1105; *Whittaker Corp v. Execuair Corp.*, 736 F.3d  
18 1341, 1347 (9th Cir. 1984)). "Establishing undue prejudice requires that the defendant  
19 show 'at least some reliance on the absence of a lawsuit.'" *Eat Right*, 880 F.3d at 1119  
20 (quoting *Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621  
21 F.3d 981, 989 (9th Cir. 2010)).  
22

1 CSCP argues that it was prejudiced by the delay through its “expenditures in  
2 building its business around its marks from mid-2013 through the date of CCI’s filing suit  
3 – September 6, 2017.” Dkt. 120 at 19. CSCP argues that it was prejudiced by the absence  
4 of a lawsuit because during this period it added to its liability by, without knowledge of  
5 the alleged infringement, continuing the practices CCI alleges were infringing. Dkt. 120  
6 at 19 n.98 (citing *Whitaker*, 736 F.2d at 1347). CSCP also argues that like the defendant  
7 in *Jarrow*, if it had known of the alleged infringement, it could have focused on  
8 characterizing its product differently to the public. *Id.* (citing *Jarrow*, 304 F.3d at 839).  
9 CCI argues that any expectations-based prejudice CSCP has sustained is negated by its  
10 “re-branding” to the trade name Crawl Pros. Dkt. 122 at 3. The Court finds that the  
11 evidence put forward by CSCP shows substantial expenditures on marketing through  
12 various mediums each year between mid-2013 and September 2017 and substantial  
13 revenue growth during that period, which could support a finding of substantial prejudice.  
14 Dkt. 120 at 6–8, 19. These expenditures indicate CSCP invested heavily in marketing  
15 using its trade name and Slogan One essentially from the inception of its business such  
16 that it could reasonably say it built its business around the marks during the period CCI  
17 delayed. Rebranding to Crawl Pros would not impact investment around Slogan One, and  
18 it is unclear that the change in trade name would entirely obviate previous investment in a  
19 similar trade name.

20 The Court finds that the first, third, and fifth factors weigh against applying laches,  
21 and the fourth factor is neutral. Even though the important second and sixth factors weigh  
22 in favor, the Court concludes that this mixed equitable analysis is not sufficient to

1 overcome the strong presumption against laches for CCI's Lanham Act claims  
2 established by the lack of conclusive evidence that the laches period started prior to the  
3 statute of limitations. The Court's evaluation may be different following factual findings  
4 by a jury.

## 5       **2.       CPA Claims**

6       CSCP argues that CCI's claims for damages under the CPA are barred by the four-  
7 year CPA statute of limitations, because CCI's CPA claim accrued in mid-2013, more  
8 than four years before CCI filed suit on September 6, 2017. Dkt. 120 at 20 (citing RCW  
9 19.86.120). Guided by its determination that neither actual nor constructive knowledge  
10 may be conclusively attributed to CCI prior to September 6, 2014, the Court denies  
11 CSCP's motion for summary judgment as to CCI's claims for damages under the CPA.

12       CSCP also argues that any CCI claims for equitable relief under the CPA for the  
13 purposes of a laches analysis would be guided by the three-year statute of limitation  
14 applied in laches to CCI's Lanham Act claims, Dkt. 120 at 10 & 10 n.72. Said another  
15 way, CSCP argues that equitable relief for trade name infringement that also violates the  
16 CPA would be governed for the purposes of a laches analysis by the three-year statute of  
17 limitations that applies to trade name infringement, RCW 4.16.080(2), not the four-year  
18 statute of limitations for claims for damages brought under the CPA, RCW 19.86.120.

19       CSCP is correct that this Court has found that "the analysis of an unfair  
20 competition claim under Washington's Consumer Protection Act will generally follow  
21 that of the trademark infringement claim . . . ." *Safeworks, LLC v. Spydercrane.com,*  
22 *LLC*, No. 08-cv-0922-JPD, 2009 WL 3169151, at \*8 (W.D. Wash, Sept. 29, 2009).



1 However, that analysis decided whether to apply the likelihood of consumer confusion  
2 test, not what statute of limitations should guide a laches analysis for equitable relief  
3 under the CPA. CSCP argues that CCI's CPA claim accrued contemporaneously with  
4 CCI's Latham Act claims. Dkt. 120 at 20. CCI counters that CSCP cannot prove CCI  
5 suffered injury sufficient for its claim to fully accrue prior to September 6, 2013  
6 following a four-year statute of limitations. Dkt. 122 at 21.

7 The Court finds that though Lanham Act claims and trademark-based unfair  
8 competition claims are subject to congruous substantive analysis, the CPA's own statute  
9 of limitations is the most appropriate statute of limitations to guide a laches analysis for  
10 equitable relief under the CPA. Therefore, the Court denies CSCP's motion as to  
11 equitable relief under the CPA for the same reasons it denied CSCP's motion as to CCI's  
12 Lanham Act claims.

### 13 **3. Copyright Claims**

14 In copyright, laches is not available as a defense to suits for damages brought  
15 within the three-year statute of limitations. *Petrella*, 572 U.S. at 677. Laches is available  
16 in extraordinary circumstances to limit equitable relief in copyright actions brought  
17 within the three-year statute of limitations. *Id.* at 685 ("In extraordinary circumstances,  
18 however, the consequences of a delay in commencing suit may be of sufficient magnitude  
19 to warrant, at the very outset of the litigation, curtailment of the relief equitably  
20 awardable."). As examples of extraordinary circumstances which might warrant  
21 curtailment of equitable relief at summary judgment, the Supreme Court cited *Chirco v.*  
22 *Crosswinds Communities, Inc.*, 474 F.3d 227 (6th Cir. 2007), where the requested

1 injunctive relief was destroying a housing project which would harm innocent third  
2 parties, and *New Era Publications Int’l v. Henry Holt & Co.*, 873 F.2d 576, 584–85 (2d  
3 Cir. 1989), where the requested injunctive relief was total destruction of a book allegedly  
4 containing infringing material that due to delay had already been printed, packed, and  
5 shipped. *Id.* at 685–86. In more ordinary circumstances, if the plaintiff ultimately prevails  
6 on the merits, the court may then consider the delay in commencing suit in fashioning  
7 appropriate injunctive relief. *Id.* at 687.

8 “[W]hile the statute of limitations [for copyright infringement] is triggered only by  
9 violations—*i.e.*, actual infringements—the laches period may be triggered when a  
10 plaintiff knows or has reason to know about an *impending* infringement.” *Kling v.*  
11 *Hallmark Cards Inc.*, 225 F.3d 1030, 1038 (9th Cir. 2000) (emphasis in original). The  
12 Supreme Court also noted that nine Courts of Appeals follow a “‘discovery rule,’ which  
13 starts the limitations period when ‘the plaintiff discovers, or with due diligence should  
14 have discovered, the injury that forms the basis for the claim.’” *Petrella*, 574 U.S. at 670  
15 n.4 (quoting *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009)).

16 CCI initially brought copyright claims regarding five documents: (1) Project  
17 Graph, (2) Project Bid Sheet, (3) Project Worksheet, (4) Clean Crawls Standards, and (5)  
18 Venting Calculator. Dkt. 1, ¶ 12. The Court granted summary judgment for CSCP as to  
19 the Project Worksheet and Standards documents, Dkt. 75 at 40, and as to the second page  
20 of the Venting Calculator, Dkt. 112 at 16–17.

21 CSCP argues CCI’s copyright infringement claims seeking injunctive relief  
22 including an order to destroy the infringing material “should be barred by the doctrine of

1 laches notwithstanding the fact that CCI may have initiated its claims under 17 U.S.C. §§  
2 502 and 503 within the applicable three-year statute of limitations.” Dkt. 120 at 21 (citing  
3 17 U.S.C. § 507(b)). CSCP argues that Henrichsen’s deposition testimony states CCI  
4 “acquired knowledge of CSCP’s alleged copyright infringement as early as September to  
5 October of 2014.” Dkt. 120 at 22 (citing Dkt. 121, Ex. 4 at 68, 71, 74, 114, 115, 116,  
6 117). CSCP also argues that because Pullen was employed at CSCP from Spring 2014  
7 through Fall 2014, CCI “should have investigated a direct competitor’s hiring of a  
8 salesman with four-years [sic] of experience at CCI handling CCI’s alleged copyrighted  
9 material.” Dkt. 120 at 22.

10 **a. Delay**

11 CSCP argues that CCI unequivocally knew or should have known CSCP was  
12 using its documents by 2014. CCI counters that it did not know until 2017. Because the  
13 Court finds as detailed below that CSCP does not show the kind of prejudice that would  
14 warrant a finding of laches at summary judgment, the Court does not decide at this point  
15 whether CCI unreasonably delayed.

16 **b. Prejudice**

17 CSCP argues that it “likely would not have produced and re-produced the alleged  
18 infringing documents, much less continue to build and develop its businesses’ sales  
19 practices around them, had CCI initiated its alleged infringement action in 2014,” Dkt.  
20 120 at 23, and analogizes an injunction to destroy the allegedly infringing materials to the  
21 destruction of work described in *Petrella*, Dkt. 126 at 11 (citing *Petrella*, 572 U.S. at  
22 686). CCI counters that “the only prejudice CSCP could show is that a finding of

1 copyright infringement earlier would have cause it to re-tool three of its documents  
2 earlier.” Dkt. 122 at 23.<sup>12</sup> The Court finds that even if CSCP was required to redesign  
3 three of its project assessment and tracking documents, the impacted interests are  
4 substantially less than those involved in destroying units of housing or a completed and  
5 shipped literary work. Therefore, as the Supreme Court suggested, if CCI ultimately  
6 prevails on the merits, the Court may consider a delay in commencing suit (if established)  
7 in fashioning appropriate injunctive relief and need not find at this juncture that laches  
8 entirely bars CCI’s copyright claims. *See Petrella*, 574 U.S. at 687.

### 9 **III. ORDER**

10 Therefore, it is hereby **ORDERED** that CSCP’s motion for partial summary  
11 judgment, Dkt. 120, is **DENIED** and CCI’s motion for leave to file declaration, Dkt. 129,  
12 is **GRANTED**.

13 Dated this 5th day of November, 2019.

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15 

16 BENJAMIN H. SETTLE  
17 United States District Judge  
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20 <sup>12</sup> The Court notes that CCI argues that according to *Petrella*, it would have been  
21 reasonable for it to delay while it assessed whether the infringing use was sufficiently harmful to  
22 justify the cost of litigation. Dkt. 122 at 23 (citing *Petrella*, 574 U.S. at 683). However, CCI does  
not argue that it *was* attempting to assess the cost of litigation, so it is unclear what relevance this  
argument has to the facts at bar.